

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SAID OMAR

Claimant

VS.

TYSON FRESH MEATS, INC.

Self-Insured Respondent

Docket No. 1,035,559

ORDER

Claimant requested review of the February 22, 2011 Post Award Medical Order by Administrative Law Judge (ALJ) Brad E. Avery.

RECORD AND STIPULATIONS

The parties' stipulations are listed in the April 27, 2009 Award entered by the ALJ. The record in this post award matter includes that initially presented and set forth in the April 27, 2009 Award, along with the following transcripts: the Post Award Hearing held on February 23, 2010; the deposition of claimant taken on October 18, 2010; and the deposition of Dr. C. Reiff Brown taken on September 9, 2010.

ISSUES

Respondent does not dispute that claimant injured his left shoulder at work on May 16, 2007, when a beef carcass fell off the chain and struck claimant's left shoulder and neck. When the claim was initially litigated the principal issues were whether claimant had also injured his neck and low back in the accident. In the April 27, 2009 Award, the ALJ found claimant was entitled to receive 17 weeks of temporary total disability benefits and 20.8 weeks of permanent partial disability benefits after finding claimant had sustained a 10 percent functional impairment to the left upper extremity at the shoulder. The ALJ did not award claimant permanent disability benefits for the cervical, thoracic, or lumbar spine as claimant had failed to prove permanent impairment.

Claimant appealed the April 2009 Award to this Board and argued, among other things, that he had a work disability (a permanent partial general disability greater than the functional impairment rating). The Board affirmed the April 27, 2009 Award. The Board held in part:

The Board agrees that the videotape surveillance of claimant undermined his credibility and refuted his complaints regarding his cervical and lumbar spine as well as his shoulder. The MRI diagnostic tests performed on claimant's cervical and lumbar spine revealed normal findings. Claimant failed to give appropriate efforts when taking the functional capacity evaluation and while demonstrating his physical ability when examined by Drs. Fevurly and Bieri. The Board finds, as stated by Dr. Fevurly, that claimant has failed to meet his burden of proof that he suffered any permanent impairment of his cervical lumbar spine as a result of his work-related accident. Consequently, the Board affirms the ALJ's finding that claimant's permanent impairment is limited to a scheduled disability to the left shoulder.¹

Claimant appealed the Board's November 2009 Order to the Kansas Court of Appeals, which affirmed the Board in a Memorandum Opinion dated October 29, 2010. During the pendency of the appeal to the Kansas Court of Appeals, claimant filed the present request for additional medical treatment.

In the February 22, 2011 Post Award Medical Order, the ALJ granted claimant additional medical care for his left shoulder, but the ALJ denied medical treatment for claimant's back. The ALJ held in pertinent part:

Claimant's request for medical treatment on his back is denied. The back was not the subject of the underlying award (See K.S.A. 440510k(a) [sic]). It had previously been litigated that Mr. Omar's back was not injured as the result of claimant's accidental injury.²

Claimant contends the ALJ erred and asserts there was injury to his lower back although "there was insufficient evidence to show that he had suffered a functional impairment. There has never been a finding that [he] did not injure his lower back, only that he had no functional impairment."³ Claimant also asserts the fourth edition of the *AMA Guides to the Evaluation of Permanent Impairment* states that a person may have an injury to the back with a zero impairment. In short, claimant represents his present increased lower back symptoms are from the natural progression of an annular tear at the L4-5 disc space, which he contends he sustained as a result of his accident at work.

Respondent contends the February 22, 2011 Post Award Medical Order should be affirmed. Respondent argues that, in essence, claimant is trying to retry the issue of whether he injured his lumbar spine in his accident at work. In addition, respondent contends claimant is precluded from requesting post award medical treatment under K.S.A. 44-510k as the lumbar spine was not the subject of the underlying award. Finally, respondent

¹ Board's Order, 2009 WL 4674074 (Kan. WCAB Nov. 18, 2009) at 7.

² ALJ Post Award Medical Order (Feb. 22, 2011) at 1.

³ Claimant's Brief at 3 (filed Mar. 24, 2011).

maintains the doctrine of *res judicata* precludes claimant from requesting post award medical treatment for his lumbar spine as respondent interprets the April 2009 Award as finding that claimant did not injure his lumbar spine in the May 2007 accident.

The only issue before the Board on this appeal is whether claimant is entitled to receive post award medical treatment for his lumbar spine.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant alleges he injured his left shoulder, neck, and low back at work on May 16, 2007, when a beef carcass fell from a chain and landed on him. The parties litigated the nature and extent of claimant's injuries and disability and claimant was denied workers compensation benefits for his neck and low back as he had failed to prove he had sustained permanent impairment. At no point in any of the proceedings did the ALJ, the Board, or the Court of Appeals find that claimant sustained an injury to his low back.

Claimant initiated this post award proceeding to request additional medical treatment for his left shoulder and back. The ALJ granted claimant additional medical treatment for the shoulder, but denied additional medical treatment for the low back. Respondent does not contest that claimant should receive the additional shoulder treatment. Accordingly, this appeal only concerns claimant's low back.

The Workers Compensation Act provides an avenue for workers to seek additional medical treatment following the entry of an award. K.S.A. 44-510k(a) provides, in part:

At any time after the entry of an award for compensation, the employee may make application for a hearing, in such form as the director may require for the furnishing of medical treatment. . . . The administrative law judge can make an award for further medical care if the administrative law judge finds that the care is necessary to cure or relieve the effects of the accidental injury which was the *subject* of the underlying award. . . .

Because the ALJ found claimant failed to prove he sustained a permanent impairment to his low back, respondent asserts the above statute precludes claimant from now pursuing additional medical treatment for his back. In other words, respondent argues the low back was not the subject of the underlying award. In addition, respondent maintains claimant is precluded from requesting additional medical treatment under the doctrine of *res judicata*. As indicated above, claimant counters that his low back injury was an issue in the underlying award and that *res judicata* does not apply as there is a new issue in play; namely, whether his low back condition has worsened to the point medical treatment is appropriate.

In support of the request for additional medical treatment, claimant testified that his back was worsening as he now experienced shooting pain down into his left hip and into his leg and foot for which he had sought treatment from an emergency room.

Claimant also presented the testimony of Dr. C. Reiff Brown, a retired orthopedic surgeon, who reviewed a January 2008 MRI (pre-Award) of claimant's low back and testified that claimant probably had a torn annulus of the L4-5 disc. The doctor also indicated that if a rent occurs in the annulus the disc material progressively pushes outward and eventually herniates and eventually reaches the dura and nerve root structures, which causes radiculopathy.⁴ According to the doctor, claimant should have received appropriate treatment for the disc injury. The doctor testified, in part:

Well, it would have included anti-inflammatory medication, possibly anti-inflammatory steroids, probably epidural steroid injections, a decrease in physical activity, it would have included pelvic traction, decompression they call it now, spinal decompression and a period of time should be given for the healing process of the anulus [sic]. Not all anulus [sic] tears heal even with proper treatment, some go on to herniate and eventually come to surgery. You can't tell what this one would have done.⁵

Dr. Brown also reviewed an April 2010 MRI. The doctor believed there was a material change at L4-5 as the more recent MRI indicated there was greater protrusion of the nucleus material and the annular tear was more easily seen.

The Board has considered the parties' arguments and the record as a whole and concludes that claimant is not entitled to medical treatment to his low back and thus, the ALJ's Post Award Medical Order should be affirmed. Although claimant argues that there was never a finding that he did **not** sustain an injury to his low back, only that he did not prove impairment, and thus he is entitled to additional medical treatment, such an argument is simply not persuasive. In essence, claimant is arguing that because neither the ALJ or the Board concluded that he didn't have an injury to his back, that he must have proven that he did, but simply failed in his burden to establish impairment. The absence of such a finding does not necessarily lead to the conclusion claimant desires. That is particularly the case when, as here, an essential component of the Board's reasoning as to claimant's ultimate impairment was based upon the surveillance video that contradicted claimant's testimony.

It is also worth noting that while the Board's original order may have been less than artful in finding that claimant failed to prove that he sustained both an injury *and* permanent impairment, that was clearly the import of the Board's Order. Indeed, the Board's findings were based upon the opinions of Dr. Fevurly, who opined that "[t]here is no ratable

⁴ Brown Depo. at 7.

⁵ *Id.* at 8.

impairment from the cervical, thoracic or lumbar spine as based on the 4th edition of the AMA's Guides to the Evaluation of Permanent Impairment.”⁶

Moreover, Dr. Brown's testimony, in essence, challenges the diagnoses following the pre-Award MRI's which found claimant's lumbar spine to be normal. Dr. Brown has indicated that claimant probably had some sort of tear that was not noted at the time. In other words, Dr. Brown is attacking the underlying judgment by his testimony. And that is not permitted as the contents of that Award are res judicata. Claimant is entitled to post award medical benefits for the shoulder injury that was found compensable in the Award but he is not entitled to post award medical benefits for his low back complaints as that condition was not encompassed by the Award.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Post Award Medical Order of Administrative Law Judge Brad E. Avery dated February 22, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned respectfully dissents from the opinion of the majority that the Board, in its original Order of November 18, 2009, found claimant did not sustain a permanent injury to either his neck or low back and claimant is therefore precluded from receiving post award

⁶ Fevurly Depo., Ex. 1 at 45.

medical treatment benefits. In that original Order, the Board held that claimant failed to prove any permanent impairment of function to his neck and low back based upon the 4th edition of the *AMA Guides*, and is required by K.S.A. 44-510e(a). The Board did not find that the claimant did not suffer injury.

The Board finds, as stated by Dr. Fevurly, that claimant has failed to meet his burden of proof that he suffered any permanent impairment to his cervical or lumbar spine as a result of his work-related accident. Consequently, the Board affirms the ALJ's finding that claimant's permanent impairment is limited to a scheduled disability to the left shoulder.⁷

Dr. Fevurly actually rated claimant's cervical and lumbar spine injuries under the *AMA Guides* injury model. That injury model resulted in a rating of 0 percent. Thus, claimant's back and neck were injured, but those injuries resulted in 0 percent impairment of function under the *Guides*.

The doctor [Fevurly] opined that claimant has DRE Cervical Thoracic Category I zero percent impairment and a DRE Lumbosacral Category I zero percent impairment pursuant to the *AMA Guides*.⁸

The ALJ erred in his February 22, 2011 Post Award Medical Order in holding that "[t]he back was not the subject of the underlying award (See K.S.A. 440510k(a)). [sic] It had previously been litigated that Mr. Omar's back was not injured as the result of claimant's accidental injury".⁹ There is nothing in the Board's November 18, 2009 Order that precludes claimant from seeking post award medical treatment for his back.

BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant
Gregory D. Worth, Attorney for Self-Insured Respondent
Brad E. Avery, Administrative Law Judge

⁷ Board Order, 2009 WL 4674074, (KW CAB Nov. 18, 2009) at 7.

⁸ *Id.* at 4.

⁹ ALJ Order (Feb. 22, 2011) at 1.